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VIA U.S. AND ELECTRONIC MAIL (THERESA.FINGER@SOS.CA.GOV)

Secretary of State
Special Projects Manager
1500 11th Street
6th Floor
Sacramento, California 95814

Attention: Theresa Aguilar Finger, MBA/TM, C.P.A.

Re: Comments on Proposed Rulemaking – Proposed Regulations on Trustworthy Electronic Document or Record Preservation (2 Cal. Code Regs. §§ 22620.1-22620.8)

Dear Ms. Finger:

This letter provides our comments regarding the proposed regulations on "Trustworthy Electronic Document or Record Preservation," Sections 22620.1 through 22620.8 of Title 2 of the California Code of Regulations. We are concerned the regulations may exceed the permissible scope of the Secretary of State's regulatory authority with regard to electronically originated records. Also, we are concerned that the proposed regulations are ambiguous, making it difficult for covered entities to know what they need to do to comply with the regulations.

1. The proposed regulations may exceed the Secretary of State's authority under Section 12168.7 of the Government Code: In the "Statement of Initial Reasons," the discussion of Proposed Section 22620.2 (Applicability of Electronic Document or Record Standards) recognizes that Section 12168.7 of the Government Code applies to municipalities and other local governments that are not state agencies only when paper records are to be destroyed after being transferred to an electronic trusted system. Yet Section 22620.2(c) brings within the scope of the proposed regulations those "electronically originated documents or records" that are maintained as official documents or records. This is beyond the regulatory authority granted in Section 12168.7.

The "Statement of Initial Reasons" goes on to explain that Proposed Section 22620.3 (Definitions) allows each local agency to define what constitutes an "official record"

for purposes of the proposed regulations. This explanation does not eliminate our concern. If a local agency defines an electronically originated record as being the official record, it must meet the standards set forth in the proposed regulations.

Example 1: Email is a record originated electronically. If a local agency chooses to retain email electronically as the official record, it will have to comply with the proposed regulations. Nothing in Government Code Section 34090 et seq. or Section 12168.7 permits the Secretary of State to adopt regulations that regulate trustworthy systems for email retention for local agencies.

Example 2: Proposed Section 22620.2 brings live databases within the scope of the regulations. A live database is one that is constantly being modified and updated, as new information is added. It is without debate that a live database is an "electronically originated … record" (Proposed Section 22620.2(c)), and if a local agency designates its code enforcement database as the official record, this provision would require that the database meet the standards in the regulations even though there is no authority in Section 12168.7 for the Secretary of State to adopt regulations that reach such local agency records.

We strongly recommend deleting Proposed Section 22620.2(c). Alternatively, the regulations should specifically exclude such live databases and spreadsheets, and we recommend that Proposed Section 22620.2(c) be amended to read:

> (c) the provisions of this chapter shall also apply to electronically originated documents or records, that are maintained as official document or records, with the exception of live databases and spreadsheets. Additionally, the provisions of this chapter shall not apply to electronically originated documents or records of those entities whose record retention obligations are governed by Government Code Section 34090 et seq.

2. Section 22620.4 may also exceed the scope of the Secretary of State's regulatory authority, and it imposes a mandate on local agencies:

The second paragraph of Proposed Section 22620.4 (Official Document or Record Storage Using Electronic Technologies) presumes that the uniform standards required to be promulgated under the relevant statute apply to municipalities and other local governments that are not state agencies. Again, so long as an entity subject to Section

34090.5 of the Government Code used an enumerated methodology from that section or a "trustworthy system" when it converted a hard copy record to electronic format, the local agency has fulfilled its obligation under state law. Nothing in Section 12168.7 or Section 34090.5 authorizes the Secretary of State to promulgate regulations that require a local agency to review and update its existing electronic content management systems to be in compliance with newly adopted regulations.

Further, the proposed regulations impose a mandate on local agencies far in excess of the estimated $92 to $319 cost because they require a local agency to update its existing system to be in compliance with the proposed regulations.

Based on the foregoing, we recommend deleting the second paragraph of Section 22620.4. Alternatively, we recommend amending the paragraph, as discussed below.

3. Regulation Section 22620.4 is ambiguous: As we read it, the second paragraph of Proposed Section 22620.4 appears to exempt electronic content management systems from compliance with the regulations if those systems were in place or established before the sixth month after the regulations were adopted by the Secretary of State. This paragraph also appears to require an agency with an existing system to evaluate its system to determine whether it achieves the intent of the new regulations. We cannot tell from the language of Proposed Section 22620.4 if our interpretations are correct and urge your office to clarify the language of this Section.

Similarly, the regulation provides that the government agency's evaluation of its existing system is to be conducted in a manner "to the greatest extent technologically possible and procedurally possible." It is unclear whether this language establishes a performance standard for evaluating an existing system, or whether it merely provides guidance to an agency in evaluating its existing system and any modifications to that system. If this language is intended to establish a performance standard, no criteria are set forth for meeting that standard. In addition, the clause "secure all necessary local and state approvals" is ambiguous. Is the intent to require existing systems to be re-approved by the local or state agency? If so, how is that process to be undertaken?

We do note that the Secretary of State responded to a similar comment that was received regarding Section 23040 during the last round of rule-making. The second paragraph of Section 23040 is the same as the second paragraph of Proposed Section 22620.4. The response to Comment S2 relating to the second paragraph of Section 23040 stated: "The language does not establish a prescriptive standard nor a

performance standard, but guidance and uses the word 'should,' not 'shall.'" We still believe that the language as drafted is ambiguous and that it is advisable to clarify the Secretary of State's intent with regard to this paragraph.

As indicated above, we recommend deleting the second paragraph of Section 22620.4. Alternatively, we suggest adding an introductory clause and a sentence to that paragraph to clarify that the provision is guidance and does not set a prescriptive or performance standard. The introductory clause would state: "It is recommended that all existing electronic content management systems...." A new sentence, added at the end of the paragraph, would state: "This paragraph does not establish a prescriptive standard or a performance standard, but provides guidance only."

4. Section 22620.6 (Electronic File Compression) is ambiguous and unreasonably restrictive: Proposed Section 22620.6 states that "only those compression technologies identified in section 5.4.2.4" of the AIIM manual "shall be used." We note that compression technologies identified in the AIIM manual are "ITU Group 4, LZW, JPEG, JPEG 2000, [or] JBIG." While the AIIM manual goes on to state "or other output format standards with no proprietary alterations of the algorithms," it is not clear that an agency subject to these regulations may rely upon that clause, as it is not an "identified" compression technology – it is a description of how to select a compression technology. We believe the proposed regulation is overly restrictive as drafted and should be deleted. If it is not deleted, we recommend modifying it to read:

> When it is determined that electronic documents or records are to be compressed and to ensure that electronic documents or records can be accessed after being converted from hard copy format, the document image compression guidelines in section 5.4.2.4 Document image compression of "AIIM ARP1-2009 Analysis, Selection, and Implementation of Electronic Document Management Systems," approved June 5, 2009, which is incorporated by reference in this section, should be followed.

Thank you for the opportunity to provide our comments. This firm represents numerous cities and local public entities that could be affected by the proposed regulations. Our comments are submitted solely on this firm's behalf from the general perspective of counsel working in this field. These comments do not

represent the particular position of any specific city or local public entity. We look forward to your response, and are available by telephone should you wish to discuss any of our concerns.

Very truly yours,

Gena M. Stinnett, Esq.

Kevin G. Ennis, Esq.

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